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No. 86-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HYDROPOOL AND COGENERATION SERVICES, INC.,
Appellants,

VS.

CALIFORNIA PUBLIC UTILITIES COMMISSION
and PACIFIC GAS & ELECTRIC COMPANY,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

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MOTION TO DISMISS

The Appellee, California Public Utilities Commission (the Commission), respectfully moves the Court to dismiss the appeal herein, on the ground that the appeal does not present a substantial federal question, or alternatively, on the ground that the case is not yet ripe for review.

I

The opinions below are correctly stated in the Appellants' (HydroPool's) Jurisdictional Statement.[1]

[1] The Commission's initial majority opinion in Decision 85-09-058 (Sept. 18, 1985) and its subsequent modifying opinion in Decision 86-02-033 (Feb. 5, 1986) are separately reproduced in the Appendix to the Jurisdictional Statement ("J.S.App."), at B and L, respectively. For the convenience of the Court, a single conformed copy of the Commission's decision *as modified* is reproduced in the Appendix hereto ("App."), at A-1—A-27. This copy includes the Administrative Law Judge's Ruling of July 30, 1985 (reproduced at J.S.App. O), which is incorporated by reference in Decision 85-09-058 and was included as an appendix to that decision.

II

Jurisdiction is asserted by HydroPool under Title 28, United States Code Section 1257(2).

III

STATEMENT OF THE CASE

This case is not about discrimination against interstate commerce, nor is it about unlawful abrogation of contracts. Rather, it is about the Commission's ability to implement, pursuant to authority clearly reserved to California by the Federal government, a program encouraging the development of cogeneration and small power production projects. It is also about how this implementation is integrated into energy resource planning in California.

HydroPool petitions this Court for review of a Commission decision which holds that because of transmission constraints in Appellee Pacific Gas & Electric Company's (PG&E's) northern service territory, HydroPool is not entitled to be paid certain prices for electric power it sells to PG&E as long as HydroPool chooses to send that power to PG&E over the bulk transmission line known as the Pacific Northwest-Pacific Southwest 500 kv Intertie (Intertie), rather than over other transmission routes.

The Commission came to this decision after considering evidence of whether transmission over the Intertie could be distinguished from transmission over other constrained transmission lines in PG&E's system. On the basis of this evidence, the Commission determined that transmission over the Intertie would disproportionately displace less expensive energy coming from the Pacific Northwest. The Commission concluded that PG&E's ratepayers should not, without an in-depth review of the matter, have to pay special prices in exchange for that disproportionate displacement. The Commission has initiated a new proceeding for the express purpose of undertaking such a review, which has not yet resulted in a decision. (OII 85-11-008; App. A-28—A-30.)

While the substance of this case is relatively straightforward, its procedural history is complex.

A. Federal Background

With passage of the federal Public Utility Regulatory Policies Act of 1978 (PURPA, 16 U.S.C. §§ 824a-3 *et seq.*, P.L. 95-617, 92 Stat. 3144), electric utilities have been required to purchase available electric energy from small power producers and cogenerators, known as qualifying facilities (QFs) (Sections 201, 210, 16 U.S.C. § 824a-3).[2] For such purchases, electric utilities must pay rates which are just and reasonable to the ratepayers of the utility and which do not discriminate against the QFs. Utilities are also required to interconnect QFs to their transmission systems in order to effectuate the transfer of QF power.

Pursuant to Section 210 of PURPA, the Federal Energy Regulatory Commission (FERC) adopted rules to encourage cogeneration and small power production. (18 C.F.R. §§ 292.303, 292.304.) FERC's rules require that electric utilities purchase electric energy and capacity from QFs at a rate equal to the utility's avoided cost of generating the power itself or purchasing it elsewhere. The implementation of the Section 210 rules is reserved to state regulatory authorities.

This Commission, in furtherance of this reservation, held lengthy public hearings which ultimately resulted in development and adoption of four Standard Offers, or avoided cost contracts, which QFs *within the California electric utilities' service areas* could enter into with those utilities. At a QF's option, it could negotiate with a utility for terms other than those set forth in the Standard Offer contracts; however, if a QF within the service area chose a Standard Offer, the utility was bound by that selection. While interconnection with the utility's transmission system was, in general, a given, none of the Standard Offers contemplated that

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[2] QFs are entities which "qualify" under PURPA for certain pricing and purchase provisions.

a QF would be seeking to interconnect with any of the utilities' bulk transmission lines.[3] *See* App. A-15.[4]

B. Origins of the Proceeding at Issue

Until recently, the Commission had addressed cost allocations for transmission system upgrades directly attributable to additional QF power on a case specific basis. However, in early 1984 PG&E became aware that serious transmission system constraints had developed throughout its northern service territory.

Based on QF concerns, staff inquires and PG&E representations, the Commission adopted Order Instituting Investigation 84-07-077 (the constraints investigation), the purpose of which was to determine whether and to what extent transmission system constraints had developed in the electric utilities' service areas which would hinder the development of QF power. The constraints investigation included all California investor-owned electric utilities.

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[3] PG&E's transmission system consists basically of two parts, the area system and the bulk system. The area transmission is composed of 60 kv and 115 kv systems and 230 kv radial lines, which connect the area loads and generation resources to the bulk system. The bulk transmission consists of 230 kv systems and 500 kv lines. The 230 kv systems carry generation to where it is needed. While the 500 kv lines carry some surplus generation which is transferred to the 230 kv systems, they primarily transfer Pacific Northwest economy power from the Oregon border into all parts of California. *See also* note 6, *infra*.

[4] In a decision in an unrelated proceeding, a 1983 PG&E general rate case, the Commission stated: "Before committing transmission resources to QFs, we would want to ascertain whether Northwest power would be displaced as a result." Decision 83-12-068, Dec. 22, 1983, at 331 (unpublished). This illustrates the Commission's early and ongoing concern with the problem of QF displacement of transmission capacity reserved for economy energy. It makes no sense whatsoever to presume the Commission ever intended Standard Offers, which did not allow for negotiation, to apply to such a possibility.

C. The Interim Solution

The decision at issue here, Decision 85-09-058 as modified by Decision 86-02-033 (App. A-1—A-27), closes the constraints investigation. It finds overall that PG&E, but no other California electric utility, has significant constraints in its northern transmission system. The decision also adopts an appropriate mechanism for allocating cost responsibility for system upgrades necessary for PG&E to accommodate QFs in that portion of its system. During the time it will take PG&E to construct the upgrades, estimated by PG&E to be between 5 and 8 years, QF power will be delivered to and purchased by PG&E according to the terms of an agreement called the Interim Solution.

The Interim Solution was negotiated by Commission staff, PG&E and certain QF representatives during the course of the constraints investigation. It established that PG&E must buy 1150 megawatts (MW) of QF electric power at Standard Offer prices during this upgrade period. It also authorized PG&E to depart, if necessary, from its general obligation to dispatch electricity in the most economically efficient manner in order to buy this 1150 MW of power. While any such uneconomic dispatch would increase ratepayer costs, the Commission held the view that the benefits of QF power already identified in past Commission proceedings on this subject justified requiring ratepayers to share the risk of costs incurred due to the Interim Solution.[5]

D. HydroPool's Attempts at Inclusion in the Interim Solution.

The Interim Solution is a temporary measure to enable QF projects to go forward despite the constraints in PG&E's service area. As negotiated by the parties, the Interim Solution's terms were limited to QFs within PG&E's service area. In response to a

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[5] The Commission's standard in setting QF prices has always been ratepayer indifference; i.e., rates should be the same whether power is supplied indirectly by QFs or directly by the utility. The Interim Solution is an exception to this standard. Even without HydroPool's power, the Interim Solution authorizes an increase in rates if necessary to obtain the benefits of QF power.

motion by HydroPool[6] and two other parties, the Commission removed this restriction in the decision approving the Interim Solution. (Decision 84-08-037; J.S.App. H.) That decision stated that the Commission did not at that time have sufficient evidence to differentiate between QFs within and outside of PG&E's service area; however, the Commission agreed with its own staff and PG&E that:

> "... unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. PG&E's ratepayers could suffer large losses if such displacement is permitted." (J.S.App. H at 8.)

HydroPool's motion sought to have 66.2 MW from the 14 projects it represented included in the Interim Solution. Because the projects involved are in Oregon and Washington and are not near any of PG&E's other constrained transmission lines, Hydropool contended that the most economical way for these projects to deliver power to PG&E was through direct interconnection with the Pacific Northwest-Pacific Southwest 500 kv Intertie;[7] consequently, it sought such interconnection under Standard Offer 4 prices.

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[6] HydroPool is primarily a marketing agent, negotiating with PG&E on behalf of out-of-state developers. At the time of the hearings in the constraints investigation, HydroPool had no financial interest in 12 of the 14 projects, only a minimal 2.5% interest in another one, and a recent partnership interest in the other. (Reporter's Transcript (R.T.) 621.)

[7] The Intertie is a huge, extra high voltage transmission line authorized by Congress to import inexpensive electric power from the Pacific Northwest to California. The primary purpose of the Intertie is to coordinate transactions between utilities, whereas other transmission lines get power from the source of generation to the load center. Its extra high voltage is rated at 500 kilovolts (kv), while other transmission lines are rated at 230 kv or less. All the major investor-owned electric utilities in California, as well as some which are publicly-owned, import relatively inexpensive power over the Intertie from the Pacific Northwest. *See also* note 3, *supra*.

PG&E and a QF trade association petitioned for modification of the Interim Solution to specifically exclude the Intertie on policy grounds. These parties argued that none of the signatories had intended for the Intertie to be included in the Interim Solution because interconnection to the Intertie could result in one-to-one displacement of economy power from the Pacific Northwest. They argued further that such displacement would not be relieved by PG&E's planned transmission upgrades or new transmission lines. The Commission declined to exclude the Intertie at that time, but granted limited rehearing on the issue, to be consolidated with the remainder of hearings in the constraints investigation.

During the pendency of those hearings, HydroPool tried to tender to PG&E long-term contracts for its projects under Standard Offer 4 which PG&E refused to sign. In April, 1985 in a totally different proceeding, the Commission prospectively suspended authority for Standard Offer 4 contracts (Decision 85-04-075; J.S.App. J). The basis for this action was that the prices originally established in Standard Offer 4 now exceeded the utilities' avoided costs and thus imposed unreasonable costs on ratepayers. Although not mentioned in its Jurisdictional Statement, HydroPool petitioned for modification of that decision, seeking to have its Standard Offer 4 tender offers exempted from the suspension order. (App. A-31—A-35.) Two months later, the Commission held that Standard Offer 4 contracts properly tendered by a QF prior to the suspension order were binding. (Decision 85-06-163, the "Orphan Contracts" decision; J.S.App. K.) However, the Commission also held that its decision on PG&E's motion to exclude the Intertie would determine the ability of HydroPool to enter into the contracts it had attempted to tender to PG&E. (*Id.* at 37, 44, 47.) The Commission did not reach the issue of whether those contracts had been properly tendered.[8]

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[8] PG&E consistently maintained that those contracts had not been properly tendered because, *inter alia*, they were not appropriate for out-of-area projects, were not properly completed, and HydroPool had no standing to tender them until it was ruled eligible under the Interim Solution.

Meanwhile, the Administrative Law Judge (ALJ) in the instant case issued a ruling on July 30, 1985 (App. A-20—A-27), which concluded that the record contained sufficient information for the Commission to distinguish between the Intertie and other constrained transmission lines for purposes of the Interim Solution. The ALJ found that direct interconnection to the Intertie 1) would displace economy power on a one-to-one basis, whenever such power is available to fill PG&E's capacity entitlement; moreover, PG&E has no flexibility to reduce this displacement, as it does with other transmission lines, and the planned upgrades will not ease the situation for the Intertie; and 2) would reduce PG&E's available firm capacity on the Intertie for negotiating purposes with Northwest utilities. He also found that PG&E has never accepted firm QF deliveries on the Intertie without price concessions relative to the price of economy power, nor has it ever represented otherwise to any QF. The ruling further noted that the Commission could, in the alternative, decide to include the Intertie in the Interim Solution *as a matter of policy*.[9]

HydroPool petitioned for urgent relief, requesting that the Commission choose the latter alternative. None of the arguments which HydroPool later raised in its application for rehearing to the Commission, its petition for writ of review to the California Supreme Court, or its appeal to this Court, was raised in its petition for urgent relief.

E. The Commission's Decision

After completion of the consolidated generic hearings and the rehearing on PG&E's Intertie exclusion motion, the Commission issued Decision 85-09-058, the decision at issue here. That

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[9] HydroPool contends the ALJ, finding these differences "insufficient to justify a recommendation that the Commission exclude HydroPool from the terms of the interim solution," simply forwarded his results to the Commission without ruling one way or the other. (J.S. at 36-37.) This inaccurately characterizes the ALJ's position. *See* App., A-24—A-27. Moreover, Rule 63 of the Commission's Rules of Practice and Procedure, reproduced at App. 36, provides that an ALJ may not issue rulings on final determinations of proceedings. The ALJ did exactly what he was authorized to do.

decision adopted and incorporated the ALJ's July ruling by reference (App. A-14), and concluded based on the record that PG&E's proposed exclusion of the Intertie was a reasonable distinction among its constrained transmission lines which did not result in unlawful discrimination against a class of QFs. The decision also ordered that another investigation be initiated into the broader question of out-of-service area QF power "in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers," including whether and when to make Standard Offers available to such QFs. (App. A-15.)

HydroPool filed a timely application for rehearing, to which PG&E and two other California electric utilities responded. On January 16, 1986, there having been no Commission action on its application for rehearing, HydroPool decided to deem it denied as permitted by California Public Utilities Code Section 1733,[10] and filed a petition for writ of review with the California Supreme Court.

On January 29, 1986, a prehearing conference was held in the new investigation. HydroPool's counsel stated he was not concerned about the scheduling of the OII because in his view the issues concerning HydroPool's projects are not issues in the OII and would not be affected by it. (R.T. 3)

On February 5, the Commission denied HydroPool's application for rehearing in Decision 86-02-033, which modified and clarified Decision 85-09-058 but did not change the result.[11] On July 30, 1986 the California Supreme Court summarily denied HydroPool's petition for writ of review, thereby rejecting HydroPool's claims on the merits, without the necessity of hearing further argument.

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[10] Section 1733 is reproduced at App. A-36.

[11] HydroPool implies, by its virtual disregard of Decision 86-02-033, that once a party chooses to deem its application for rehearing denied, Section 1733 precludes further Commission action. HydroPool provides no authority for this position, nor does any exist.

ARGUMENT

I

HYDROPOOL'S COMMERCE CLAUSE ARGUMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

HydroPool asserts the Commission's action falls within the category of state regulations that "affirmatively discriminate against interstate commerce" (J.S. 41), because "the ultimate effect of the Commission's ruling is to exclude out-of-state QFs from participating in sales of power to PG&E on the terms and conditions which are simultaneously being offered to QFs located in California." (*Id.* at 42.) HydroPool's argument fails on several counts.

The Commission does not create a distinction between in-state and out-of-state QFs. Decision 85-09-058 excludes from the Interim Solution QFs outside of PG&E's service territory connecting with the Intertie north of Round Mountain, whether or not those QFs are in California. The exclusion does not rest on HydroPool's geographical status, but on the type of transmission line to which HydroPool wants to interconnect, and the price to be paid for HydroPool's power.

Nor has the Commission precluded HydroPool from selling to the Northern California market by means of the Intertie. Nothing in the Commission's order prevents HydroPool from negotiating a contract with PG&E. In fact, PG&E has offered HydroPool an arrangement through an area transmission line, as opposed to the larger Intertie, which HydroPool has rejected for its own business reasons. (R.T. 820-821, 857-858.) HydroPool has, however, been precluded from participation in the Interim Solution at the Standard Offer 4 price, for legitimate reasons which are supported by the evidence in this case. But this does not amount to preclusion from the Northern California market.

Moreover, the Commission has not interfered with competition between intra- and interstate commerce. No California QF would be displaced by HydroPool's power. The Commission made clear that the 66.2 MW HydroPool hoped to deliver to PG&E could be

added to the Interim Solution, should HydroPool be found to be an appropriate participant. Nothing would be subtracted from the terms of that agreement. The only subtraction would be the Northwest economy power which HydroPool would be displacing.

Finally, the Commission's order in no way interferes with the movement of electricity in interstate commerce. Energy will continue to flow from the Pacific Northwest down the Intertie in exactly the same amounts, whether or not HydroPool's energy is included. But while HydroPool may have a right under PURPA to contribute to that energy flow, it has no constitutionally protected right to be a part of that flow at a price which *it and it alone* dictates, over a transmission line which *it and it alone* chooses.[12]

A. HydroPool's Factual Analysis Does Not Support a Finding of Discrimination Against Interstate Commerce

HydroPool asserts the Commission's action is the kind of affirmatively discriminatory legislation identified in *Maine v. Taylor*, ___ U.S. ___, 106 S.Ct. 2440 (1986), and struck down in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), which invokes the strictest scrutiny of asserted local benefits and nondiscriminatory alternatives. HydroPool, however, fails to satisfy the threshold test: it does not demonstrate either that the Commission's decision affirmatively discriminates against interstate commerce, or that it discriminates in practical effect. *See, e.g., Hughes v. Oklahoma, supra*, at 336.

HydroPool first argues that the Commission "concedes" it is discriminating against interstate commerce by "characteriz[ing] [in Decision 85-09-058] the petition to exclude HydroPool as presenting 'the general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection' with the transmission lines of California utilities." (J.S. 41.)

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[12] The terms and conditions of HydroPool's participation are issues in the new investigation which have not yet been resolved; see App. A-28—A-30.

HydroPool not only takes this language out of context; it also ignores completely the language of Decision 86-02-033, which modifies Decision 85-09-058 to clarify the Commission's intent. Only after stating that HydroPool is not being excluded from the Intertie, and discussing the evidentiary basis as to why HydroPool will not be allowed to pay Standard Offer 4 prices during the pendency of the Interim Solution if it insists on delivering power over the Intertie, does Decision 85-09-058 as modified by Decision 86-02-033 address the more general problem:

> "Finally, we do not reach the larger question of whether, and, if so, under what conditions, QFs ever should have access to the Intertie under a Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. . . .
>
> "By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on HydroPool's projects. . . ." (App. A-15, A-16).

HydroPool secondly asserts that the choice of Round Mountain as the Intertie connection point above which no QF will be able to get Standard Offer 4 prices discriminates in practical terms against out-of-state QFs, because Round Mountain is virtually at the Oregon border. (J.S. 25, 42.) This assertion is equally meritless. As perusal of a map of California will show (*see* J.S. App. U), Round Mountain is at least 100 miles south of the border. Three entire California counties are north of this location. The point is that regardless of geographical location, *any* QF insisting on interconnection with the Intertie north of Round Mountain would have been denied Standard Offer 4 prices just as HydroPool was. Moreover, any QF, including HydroPool, north of Round Mountain and choosing to interconnect with PG&E's

transmission system through a route other than the Intertie could have taken advantage of Standard Offer 4 prices.[13]

In asserting that Round Mountain is the only "practical" point of entry for out-of-state QFs, HydroPool is really saying that Round Mountain is the most economic point for entry of its projects. But it is certainly not the Commission's responsibility to ensure that a private entrepreneur is able to do business in the most profitable way.

B. HydroPool's Legal Analysis Asserts the Wrong Test

Because HydroPool fails to meet the threshold test of demonstrating that the Commission's action affirmatively discriminates against interstate commerce, this action does not invoke strict scrutiny of local benefits and nondiscriminatory alternatives, but must turn to the question of whether any burden imposed in interstate commerce is "clearly excessive in relation to the putative local benefits." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Here the State, through this Commission, has a legitimate interest in protecting PG&E's supply of economy energy and PG&E's negotiating posture for that energy, as part of its more general responsibility to ensure that California's ratepayers pay the lowest possible rates for power. It also has an interest, and, in fact, a responsibility under PURPA, to ensure that the QF industry will continue to exist during this temporary period when PG&E is making the necessary upgrades in its transmission system. It has yet a further interest in seeing that the rules it has enacted *pursuant to PURPA*[14] are applied in a reasonable and

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[13] In fact, PG&E has a second connection to the Pacific Northwest other than the Intertie. (R.T. 390-392.) HydroPool rejected PG&E's offer to negotiate a contract for HydroPool's power through an arrangement other than the Intertie. (R.T. 820-821, 857-858.)

[14] Despite HydroPool's inferences to the contrary, PURPA does not address either the out-of-state QF situation, or the situation where a QF wants to interconnect with a bulk transmission line.

expeditious manner, and that any exceptions to those rules are carefully examined before being authorized.

In contrast, any interference with interstate commerce is incidental and minimal. In order to send its power to PG&E over the Intertie, HydroPool must either wait to see what the Commission will decide in its recently instituted investigation, or must be willing to negotiate a lower price or some other alternative with PG&E now. Its other choice is to enter the Oregon and Washington markets as it seeks to do here, i.e., on its own terms. While HydroPool clearly prefers the California market, it has not shown a constitutionally protected right to enter that market. As this Court has stated in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978), the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." A nondiscriminatory regulation furthering substantial state purposes is not invalid "simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 474.

In the case at bar, the Commission's order has not even caused a shift from inter- to intrastate industry. HydroPool's projects have never been involved in the interstate market. The Commission has yet to determine generic rules for that market. Until that task is completed, HydroPool can properly be restricted to entering the interstate market under terms reflecting the circumstances of its own situation.

In fact, HydroPool does not seriously dispute the substantiality of any of the Commission's above-described interests.[15] Rather,

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[15] HydroPool postulates its own notion of what the Commission might assert as "legitimate local purposes," and attempts, through selective citation of a number of prior Commission decisions, to show that the Commission itself has rejected their "legitimacy in the context of its adjudications of the rights of California QFs." (J.S. 45: *see also, id.* at 43-44.) This approach has no merit.

First, it misstates the above-discussed "local purposes" fostered by the Commission's action. For example, in D.85-09-058, the Commission was not concerned about the burdens that wheeling of HydroPool's

HydroPool's only serious basis for challenge is its allegation that the record does not support the Commission's finding that deliveries of power to the Intertie above Round Mountain would cause a proportionately greater displacement of economy energy than would deliveries below that point, because the latter could be diverted to other lines during periods of overload. (J.S. 45-46.) In taking this position, HydroPool is, in effect, asking this Court to review the evidence and determine whether it is sufficient to support the Commission's findings.

The Commission's findings concerning displacement were made after hearing evidence from both PG&E and HydroPool. The ALJ's ruling, which the Commission incorporated by reference in Decision 85-09-058, discussed that evidence in detail. The evidence was conflicting. The Commission drew different conclusions from that evidence than HydroPool hoped it would.[16] But such is wholly within the Commission's prerogative as trier of fact. "When conflicting evidence is presented from which con-

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power would impose on PG&E. Secondly, it misstates the facts. The Commission did not "require" PG&E to continue accepting QF power during the upgrade period; PG&E stipulated with the Commission staff and QF representatives to do so in the Interim Solution. Finally, as stated by HydroPool itself, those prior Commission decisions dealt with what prices *California QFs* should be paid, in entirely different circumstances than the case at bar. No serious transmission constraints had yet been recognized, and no one at the time of any of those prior decisions contemplated that direct interconnection to the Intertie would be proposed. (*See* App. A-15.)

[16] The conclusions HydroPool hoped the Commission would come to appear primarily at pages 32-36, 46 of HydroPool's Jurisdictional Statement. The Commission did not agree, concluding, rather, that the record clearly demonstrated that HydroPool's projects would displace economy imports over the Intertie for a longer period and to a much greater degree, both qualitatively and quantitatively, than other QFs under the Interim Solution. *See* Decision 85-09-058, Finding 9, Conclusion 3 (App. A-17, A-18); ALJ Ruling 2-9 (App. A-20—A-27); *see also* specific exhibits and cross examination of PG&E witnesses Malinowski (*see, e.g.*, Ex. 20; R.T. 371, 389) and Kerler (*see, e.g.*, Ex. 1; R.T. 36-37), and cross examination of HydroPool's witness Weatherwax (R.T. 239, 244-245, 258, 259, 291-292).

flicting inferences can be drawn, the commission's findings are final." *Toward Utility Rate Normalization v. Public Utilities Commission,* 22 Cal.3d 529, 538 (1978).

It has long been the rule that this Court, in considering the question of sufficiency of evidence to support an administrative order, must and does rely largely upon a reviewing court's conclusion. *Radio Corporation of America v. United States,* 341 U.S. 412, 415 (1951); *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 491 (1951). This Court will normally not interfere with findings of fact of a state utilities commission which have been approved by a lower court. *United Gas Public Service Co. v. Texas,* 303 U.S. 123 (1938); *Georgia R. & Power Co. v. Railroad Comm.,* 262 U.S. 625 (1923). Here, the California Supreme Court has affirmed the Commission's interpretation of the evidence.[17] HydroPool has given this Court no good reason to interfere with that judgment.

Finally, should the Court determine that a stricter standard of review must be undertaken in this case, the Commission submits that the so-called "nondiscriminatory alternatives" proposed by HydroPool are not acceptable. Those alternatives would, indeed, amount to special treatment for a QF seeking what has never been accepted before by either PG&E or this Commission, and is in no way required by PURPA: direct interconnection with the Intertie, with frequent one-to-one displacement of economy power which has already been subscribed to by Pacific Northwest utilities, at Standard Offer 4 prices.

Moreover, the alternative proposed by PG&E, that HydroPool connect under the Interim Solution to an *area* transmission line instead of the Intertie, was rejected by HydroPool for its own business reasons. (R.T. 820-821, 857-858.)

The Commission has, however, provided the most nondiscriminatory alternative of all, *i.e.,* the new investigation into the rights and obligations of out-of-service area and out-of-state QFs. (App. A-28—A-30.)

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[17] HydroPool correctly points out that this affirmation is a decision on the merits. J.S. 2, 40.

II

HYDROPOOL'S CONTRACT CLAUSE ARGUMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

HydroPool's Contract Clause argument is, in essence, that since the state of the law in this area is unsettled, this Court should use the instant case to clarify matters. This argument assumes the existence of valid contracts which the Commission has allegedly wrongfully abrogated.[18] Review of the record demonstrates that contrary to this assumption, HydroPool never had valid contracts in the first instance.

HydroPool erroneously asserts that it had made valid Standard Offer 4 tenders to PG&E before April 17, 1985, the date of the Commission's Orphan Contracts decision. Correspondence with PG&E shows that HydroPool tried on several occasions to get PG&E to commit itself to HydroPool's projects, all without success. (Ex. 13; Ex. 19; Ex. 19b.) Anticipating imminent Commission suspension of Standard Offer 4, HydroPool finally delivered several such contract tenders to PG&E's offices. No evidence exists that PG&E officials had ever represented to HydroPool that Standard Offer 4 contracts were appropriate for its projects, and, in fact, HydroPool itself recognized that its projects were in some ways unique and would thus require special contract provisions. (Ex. 19b, referring to earlier letter to PG&E from HydroPool.) After this tender, PG&E wrote back to explain the problems with the contracts apart from PG&E's basic position that the Interim Solution did not include any QFs wanting to interconnect with the Intertie. (*Id.*)

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[18] The "contracts" in this case are not, of course, traditional agreements reached by two parties bargaining at arm's-length. Rather, the Standard Offer 4 contract has been devised by this Commission as a "form" contract establishing the prices PG&E must pay QFs under certain conditions. If such a QF meets the requirements for and actually tenders such a contract, it must be accepted by PG&E. The Commission in Decision 85-09-058 held that HydroPool did not have the right to enter any Standard Offer 4 contracts under the interconnection terms it insisted on.

Shortly thereafter, the Commission's Decision 85-04-075 suspending Standard Offer contract tenders was issued. (J.S.App. J.) HydroPool petitioned for modification of that decision, requesting the Commission to declare that HydroPool's tenders were exempt from the suspension. (App. A-31—A-35.) Since PG&E had refused to finalize the tenders, HydroPool argued it would be unfair for the cut-off date to apply to its obviously incomplete tenders. The subsequent Orphan Contracts decision, which clarified that in general, all tenders which were completed by the cut-off date would have to be honored, specifically provided that the Commission's resolution of PG&E's petition to modify the Interim Solution to exclude interconnections with the Intertie would determine HydroPool's ability to enter into Standard Offer 4 tenders. (Decision 85-06-163 at 37, 44, J.S.App. K.) HydroPool never petitioned for rehearing of the Orphan Contracts decision, thus that decision is final and is *res judicata* here. California Public Utilities Code Section 1709;[19] *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 902 (1979).

Subsequent to the issuance of Decision 85-09-058, HydroPool has taken the opposite position on the Standard Offer 4 issue. It argues before this Court, as it did in its application for rehearing to the Commission and its petition to the California Supreme Court, that its tenders were valid as of the cut-off date; thus both PG&E and the Commission must deem those tenders to have become valid Standard Offer 4 contracts.

This is a disingenuous assertion. First, in filing its petition for modification, HydroPool as much as admitted that it had no valid Standard Offer 4 tenders at the time of the cut-off date. Otherwise that filing, which was not made in the alternative, makes no sense whatsoever. Secondly, while PG&E asserts just as vigorously that HydroPool's tenders were not substantively acceptable, this question has never been reviewed by the Commission. Such would have been appropriate if the Commission had denied PG&E's petition to modify; however, the Commission granted that petition, and in so doing found that HydroPool had no ability

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[19] Section 1709 is reproduced at App. A-36.

to enter into such contracts at all, without regard to when they had been tendered or what PG&E's response to them had been.

It follows from the above that whatever the merits in general of its dissertation on the Contract Clause, HydroPool's argument that this case presents the "ideal vehicle" for the Court to clarify its position on that Clause is completely without merit.[20]

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[20] Concerning that analysis, *Energy Reserves v. Kansas Power & Light*, 459 U.S. 400 (1983) states, at 411: "The threshold inquiry is 'whether the law has, in fact, operated as a substantial impairment of a contractual relationship.' " As the discussion *supra* shows, no contractual relationship existed; HydroPool had merely an expectation of such a relationship which never came to fruition. However, assuming *arguendo* the existence of such a relationship, the *Energy Reserves* analysis provides no additional help to HydroPool. That decision, in assessing the degree of impairment of the contractual relationship, next asks whether the industry has been regulated in the past. *Id.* Certainly the QF industry, though not regulated like the utility industry, has been regulated in some areas, although it is true that QFs like HydroPool, who wanted individual treatment like direct interconnection with the Intertie, were never included in any of the Standard Offer arrangements but were left to negotiate "nonstandard" contracts with the utilities.

If impairment of the contractual relationship is found, the State must then assert a "significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem." *Id.* at 411-412. Again, assuming *arguendo* that impairment is found, certainly the Commission's interests as set forth in Section I.b of this Motion should amply satisfy this prong of the test. Finally, the Court will inquire as to whether the adjustment of the parties' rights and responsibilities is reasonable and appropriate, given the public purpose asserted. *Id.* This prong, too, is satisfied. HydroPool was offered other opportunities which it rejected, solely for business reasons; moreover, its rights are yet to be adjudicated as part of the Commission's investigation into the broader questions raised by out-of-service area and out-of-state QFs. Thus even should a contract be found to have existed and to have been impaired, HydroPool's contract rights have not been unlawfully abrogated under the standards set forth in *Energy Reserves*. The Commission submits that despite the views of certain scholars as to the continuing viability of the Contract Clause, HydroPool simply has no case.

III

GRANTING THE RELIEF HYDROPOOL SEEKS WOULD UNDERMINE CALIFORNIA'S AUTHORITY UNDER PURPA AND WOULD DECIMATE STATE UTILITY RESOURCE PLANNING

HydroPool seeks to magnify the significance of this case by contending the Commission's action threatens to destroy the federal small power preference program created by PURPA. The exact opposite is true. The Commission, by its action in excluding the Intertie from the Interim Solution, has ensured that the federal program can continue during a period of severe transmission constraints for one of the major electric utilities in California. The Commission's action also ensures that the rules the Commission implements under its delegated PURPA authority are enacted in an orderly fashion, after careful examination of all the relevant factors, rather than only the circumstances affecting one QF. Finally, it ensures that the PURPA rules will not result in unreasonable rates to California's ratepayers, and that those rules will be properly integrated into utility resource planning in this State.

Granting HydroPool the relief it seeks would have just the opposite impact. California's ability to maintain control over all of these important responsibilities would be seriously undermined if it is determined that a QF in HydroPool's position can single-handedly dictate where its power can enter a utility's system, and at what price. The Commission would lose control over its PURPA rules, which have been over five years in the making and which are still evolving. Moreover, it would lose control over setting reasonable rates and utility resource planning, if economy energy coming into the State can be supplanted by more expensive QF power at a QF's whim. The Court should refuse to partake in such a result.

IV

THIS CASE IS NOT RIPE FOR REVIEW

This appeal should be dismissed for want of a substantial federal question. However, in the alternative, the Commission submits that the case is not yet ripe for review, because of the pending administrative proceeding which may well affect HydroPool's rights in this matter. The issues in dispute in the instant case, *i.e.*, the conditions of purchase and the prices to be paid to out-of-service area and out-of-state QFs wishing to deliver power directly over the Intertie, will be considered in the Commission's OII 85-11-008, the investigation instituted in November, 1985 in response to the concerns of HydroPool and others. (App. A-28—A-30.) This investigation will constitute the initial determination of the proper price to be paid for such power, and will decide under what conditions, if any, a Standard Offer type of arrangement should be made available to QFs in HydroPool's situation. These issues have in no way been foreclosed by Decision 85-09-058, for HydroPool or for any other QF.

This Court has previously rejected without prejudice an appeal from a decision of this Commission under similar circumstances, where further administrative proceedings "may remove the basis for, or significantly alter the nature of, appellants' constitutional attack." *Dump Truck Owners Assn. v. Public Utilities Commission*, 434 U.S. 9 (1977). Should this Court not be prepared to dismiss this appeal for want of a substantial federal question at this time, the Commission asks that in the alternative, the appeal be dismissed as not being ripe for review.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss HydroPool's claim for want of a substantial federal question. In the alternative, the appeal should be dismissed as not being ripe for review.

Respectfully submitted,

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Utilities Commission

November 28, 1986

Appendix A

[Conformed copy of Decision 85-09-058, filed September 18, 1985, as modified by Decision 86-02-033, filed February 5, 1986.]

DECISION 85-09-058 SEPTEMBER 18, 1985
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	I.84-04-077 (Filed April 18, 1984)

(See Decisions 84-08-037 and 85-01-038 for prior appearances.)

Additional Appearances

Ann P. Cohn, David N. Barry, III, and Jennifer Moran, Attorneys at Law, for Southern California Edison Company, Respondent.

Graham & James, by *James Squeri,* Attorney at Law, for Union Oil Company of California; *Neal A. Johnson,* for California Waste Management Board; *Robert Logan,* for himself; *Alicia Torre,* for International Power Technology; and *Margaret Rueger,* for U. S. Windpower, Inc.; Interested Parties.

OPINION

I. *Summary*

By this order, we close an investigation into transmission limitations in utility systems which may affect the development of Qualifying Facilities (QF). We find that Pacific Gas and Electric Company (PG&E) may have significant constraints in its northern system. The other two utilities, Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E), should not have significant transmission constraints.

II

BACKGROUND

On April 18, 1984, the Commission issued Order Instituting Investigation (I.) 84-04-077 to examine alleged transmission constraints in PG&E's transmission system which would affect QF development. The Commission also wanted to assess the extent of any limitations in other utilities' transmission systems which would affect QF development.

The respondent utilities filed statements of anticipated limitations on their bulk and area transmission systems over the next ten years which may affect QF development. In these statements, only PG&E predicted that it would have significant constraints in its northern transmission system.

After submission of the utilities' statements, the Public Staff Division (staff) held several workshops at which an interim solution was developed for PG&E's northern transmission system, a milestone procedure for QF development was formulated, and transmission cost allocation approaches were discussed. (See Decision (D.) 84-08-037 and D.85-01-038.) The participants in the staff's workshops were able to resolve several issues and thereby reduce the need for formal hearings.

Hearings were held from April 8-12, 1985 on three subjects: utilities' transmission constraints, cost allocation approaches, and access to the Pacific Northwest-Pacific Southwest 500 kilovolt (kV) Intertie (Intertie) under the terms of the interim solution (see Appendix A). PG&E, Edison, SDG&E, Santa Fe Geothermal, Inc. and Ultrasystems, Inc. (Ultrasystems), Independent Energy Producers (IEP), Cogeneration Services, Inc.-HydroPool (HydroPool), and staff presented witnesses. Concurrent briefs were filed by May 24, 1985.

III
Transmission System Limitations

A. PG&E's Transmission System

1. Transmission Constraints

James H. Malinowski, PG&E's Chief Transmission Planning Engineer, testified that transmission capacity is not currently available in some areas of PG&E's northern system. Malinowski stated that from 1980 to 1984, the megawatts (MW) of signed QF contracts increased from 204 MW to 6,593 MW. Malinowski asserted that this unexpected increase in QF power exceeded available transmission capacity in its northern system.

According to Malinowski, the availability of transmission capacity is dependent on existing and future load levels as well as existing and future generation. In PG&E's northern area, generation consists of area hydro, imports, geothermal, Rancho Seco, other entities, and QFs. This anticipated generation will exceed the expected load during certain hours of each year for the next ten years.

In PG&E's southern area, the company is monitoring the development of large enhanced oil recovery projects to determine if capacity constraints will emerge.

Malinowski sponsored the following table showing that the northern system already has a resource-load imbalance:

Load, Excluding System Line Losses (MW)
and
Resources, Excluding Northwest Import (MW)

Main Area	Installed Capacity	Typical Resources On Line	Peak Load	Surplus Resources	Resources Needed to Meet Load
Northern	8,892	7,290	5,328	1,962	—
Bay Area	4,670	2,232	5,540	—	3,308
Southern	7,290	5,366	5,062	304	—

Northern Area includes SMUD and Humboldt, Shasta, Colgate Drum, De Sabla, North Bay, Sacramento, and Stockton Divisions.

Bay Area includes San Francisco, East Bay, and San Jose Divisions.

Southern Area includes MID, TID, and San Joaquin and Coast Valleys Divisions.

Malinowski stated that most of the northern area's 1,962 MW of surplus resources will be transmitted to meet Bay Area load. According to Malinowski, this transfer of power will fully load some bulk transmission lines. As a result, any additional QF power in the northern area would cause these transmission lines to overload.

PG&E has conducted a study to determine which lines would be overloaded during the summer peak and the spring partial peak periods. This study showed that the existing bulk transmission system had no available capacity for firm deliveries of QF power. Malinowski testified that under normal conditions the following 230 kV lines and 500 kV capacitors would be overloaded:

a. Gold Hill-Tesla

b. Rancho Seco-Tesla

c. Bellota-Tesla Nos. 1 and 2

d. Tracy-Tesla Nos. 1 and 2

e. Vaca-Dixon-Contra Costa Power Plant (CCPP) Nos. 1 and 2

f. Vaca-Dixon-Moraga Nos. 1 and 2

g. Round Mountain-Table Mountain 500 kV series capacitors

Malinowski also testified that constraints exist in several area transmission systems within the northern system. In most of these areas, which are rural or suburban, the load and expected load growth is small compared to urban areas. Consequently, existing transmission lines are of relatively low capacity. In addition, the area generation often exceeds the area load. The following table shows the available transmission capacity in the northern areas:

Sub Area	Load (MW) Maximum (A^1)	Load (MW) Minimum (A)	(MW) Existing and Planned Generation (B)	(MW) Maximum Export (C)=(B-A)	(MW) Existing Transmission Capacity (D)	(MW) Available Transmission Capacity (E)=(D-C)	(MW) Potential QF Generation**** Allocated	(MW) Potential QF Generation**** Wait List
Humboldt Division	130	40	128	88	88	0-90*	90.0	136.5
Includes Trinity County—Shasta	19	5	106	101	106	5	4.5	40.0
Pit 1 System	3	1	7	6	16	10	27.0	0.5
Cedar Creek 60 kV Area	3	2	38	36	36	0	4.5	4.0
Battle Creek 60 KV Area	75	34	78	44	84	40	70.0	20.0
Caribou 60 kV Area	0	0	339**	339	390	51		
Feather River Area	40	16	38	22	37	15	0.5	63.0
Paradise 60 kV Area	52	17	417	365***	365	0	20.5	12.0
Colgate 60 kV Area	220	132	245	113	113	0	20.0	59.0
North Bay North	865	519	2,132	1,613	1,613	0	382.0	862.5
North Bay South	4	2	174	172	172	0	20.0	7.3
Drum Division								

* 90 MW available if Humboldt Bay Units 1 and 2 are backed down.

** Includes 44 MW of import from the Caribou 60 kV area.

*** B - A^1

**** List as of February 8, 1985.

2. Transmission Upgrades

Malinowski testified that two groups of transmission upgrades to its bulk transmission system have been identified. The first group will provide transmission carrying capability for an additional 1,150 MW of QFs, the QFs interconnecting under the terms of the interim solution. (See D.84-11-123 modifying D.84-08-037.) These bulk upgrades, their estimated cost, and expected operating dates are as follows:

Potential Bulk Transmission Upgrades
For First 1,150 MW of Added QF Power

	Estimated Cost (in Million of 1984 Dollars)	Expected Operating Date
String a second 230 kV circuit from Gold Hill to Tesla	3.4	March 1988
Add about 500 MVARS of shunt capacitors	8.0	June 1989
Build an additional 230 kV DCTL from Bellota to Tesla	18.2	December 1989
Rebuild the Vaca-Dixon-Contra Costa 230 kV DCTL	37.2	December 1990
Rebuild the Vaca-Dixon-Moraga 230 kV DCTL	55.4	June 1991
Add second 500/230 kV transformer bank at Tesla	15.5	June 1992
Total	137.7	

The second group of bulk upgrades will accommodate the transmission requirements of an additional 2,000 MW of QFs power in the northern area. Approximately 2,000 MW of QFs are on a PG&E waiting list for transmission capacity in the northern area. These upgrades and their estimated cost are as follows:

Potential Bulk Transmission Upgrades
For Another 2,000 MW of Northern QF

	Estimated Cost (in Millions of 1984 Dollars)
Upgade Round Mountain series capacitors	$ 26.1
Build new Table Mountain—Telsa 500 kV line and install series capacitors and transformer banks at both ends	154.8
Replace conductors of Weber-Tesla section of the Bellota-Telsa 230 kV DCTL with SSAC	7.5
Add two circuits of two 3,500 kcmil cables at the underground section of Castle Rock Junction-Lakeville line	5.4
Rebuild the Lakeville-Vaca-Dixon 230 kV DCTL with 2-1113 kcmil AAL conductors	27.8
Total	$221.6

Finally, Malinowski described planned area transmission upgrades as follows:

Area Reinforcements

Area	Transmission Capacity (MW) Available	To Be Added	Estimated OD	Cost* $ x 1000	$/Kilowatt (kW)**
Pit 1	5	100	1988	9,000	90
Cedar Creek	10	38	1987	4,400	116
Battle Creek	0	25	1987	2,000	80
Caribou 60 kV & Feather River	40	100	1990	13,500	135
Paradise	15	50	1987	3,000	60
Colgate	0	30	1988	2,500	83
North Bay North	0	80	1988	5,500	69
North Bay South	—	—	—	—	—

* In 1985 dollars.

** $/kW of area transmission capacity added—excludes $119/kW of bulk transmission costs.

U. S. Windpower, Inc. (USW) in its brief stated that PG&E has provided incomplete information on transmission constraints in the Altamont Pass area. Malinowski during cross-examination testified that there are transmission contraints in this area. He further stated there is a waiting list of at least 700 MW of QFs desiring transmission capacity in this area.[1] USW observes that PG&E has not provided examples of planned upgrades which will relieve these constraints in Altamont Pass.

B. Edison's Transmission System

Edison does not expect to have any transmission limitations during the ten-year period ending in 1994 that will constrain QF development. E. M. Helm, Senior Planning Engineer, testified that the company's Fall 1984 Generation Resource Plan was 3,250 MW of renewable and alternate resources for the period 1985-1994. Helm stated that Edison has planned to develop its transmission system to accommodate these QF facilities. Accordingly, Edison does not expect any major difficulty in integrating QFs into its resources.

C. SDG&E's Transmission System

SDG&E also does not anticipate any bulk transmission constraints in its service territory which will limit QF development over the next ten years. Ronald Erdman Busher, Supervisor of Transmission Planning, identified two areas which have potential limitations: Boulevard and Warner Springs. However, Busher further testified that the actual QF development in these two areas will not surpass the line capacity in these areas. Thus, SDG&E believes there also are no significant area transmission limitations in its system.

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[1] By letter dated July 3, 1985, counsel for PG&E informed the administrative law judge (ALJ) that certain transmission lines in the Altamont Pass area have been "uprated" to accommodate most of the QFs on the waiting list.

IV
Transmission Cost Allocation

After studying the utilities' evaluations of their transmission systems, the parties examined transmission cost allocation approaches. The staff held a workshop to see if the parties could agree upon a basic allocation of most transmission upgrade costs to utilities and their ratepayers. General agreement was reached; however, minor differences arose during the hearings.

The staff, through its witness Julian Ajello, stated that utilities have the responsibility for anticipating the growth of QF resources. Utilities also must plan and construct adequate transmission capacity. Ajello emphasized that QFs are a significant portion of utility resource plans and therefore must be considered in utility transmission plans. Ajello further stated that the cost of transmission capacity which has multiple purposes is a legitimate ratepayer expense. Thus, staff believes the cost of transmission lines or upgrades should be allocated to ratepayers unless the transmission facility does not serve multiple purposes.

PG&E believes that the reasonable cost of nondedicated facilities necessary to take QF power should be paid by ratepayers. However, PG&E's witness Malinowski asked the Commission for guidance on the reasonableness of a transmission facility cost. Malinowski suggested that a cost cap of about $150/kW could be used as a guideline for determining reasonable area transmission costs. Malinowski explained that the company really was seeking Commission approval of the concept of a cap as a guideline and not for the fixing of a particular cap.

Edison urges the Commission to approve the company's current allocation under which the QF pays for transmission facilities which are directly related to or required by QFs. If an upgrade is not directly required by or solely beneficial to a QF, the QF has no cost reponsibility. In other words, as Edison's witness Helm stated, if a transmission facility has system benefits, then the QF need not pay for it.

SDG&E asserts that its analysis of a transmission facility's cost is the same for QFs, all other resources, and customers. SDG&E analyzes the following factors for each transmission line:

1. Future system growth needs
2. System security and reliability
3. Emergency support
4. Economy energy access
5. Transmission losses
6. Transfer capability
7. Firm resources at system peak conditions
8. Cost effectiveness

SDG&E believes that each transmission line or upgrade must be evaluated under the above criteria. SDG&E submits there is no need for the Commission to change the company's existing transmission planning method.

IEP asserts that it is the utility's obligation to plan and to build tranmission upgrades or lines when there are benefits to ratepayers. IEP submits that as a general rule most transmission upgrades or lines will have system benefits and therefore should be paid for by the utility's ratepayers.

IEP asks the Commission to adopt a cost cap to provide some certainty about QF access to transmission. IEP proposes that any transmission project undertaken at an estimated expense below the cost cap would be presumed reasonable. In this way, IEP asserts a QF will have an indication of what transmission lines should be built by the utility to accept QF power.

IEP's witness Jan Hamrin testified that a cap of about $180/kW is appropriate for all utilities' area transmission lines. Hamrin agreed with PG&E's witness Malinowski that all bulk transmission lines have generalized system benefits. Accordingly, a cost cap for bulk transmission lines is unnecessary since the ratepayers always are responsible for these lines.

Ultrasystems submits that a cost cap for transmission projects should not be adopted. Ultrasystems states that the adoption of a cost cap would assume a long-run avoided cost for the utility which has not yet been determined. Ultrasystems argues that until the long-run avoided cost methodology is determined, a transmission cost cap cannot be adopted.

Pacific Lighting Energy Systems (PLES) agrees that QFs should not be responsible for transmission facilities which have system-wide benefits to customers. PLES points out that this general concept is expressed in several ways by the different utilities. Accordingly, PLES recommends that the Commission adopt Edison's language as the standard for all utilities to avoid different applications by the utilities.

In addition, PLES submits that a cost cap, if adopted, should be used only as a general guideline in assessing the reasonableness of a transmission project. PLES emphasizes that a QF should have the right to come to the Commission if a utility refuses to build a transmission upgrade or line because its cost exceeds the cost cap.

V

Refund of Interim Solution 1.7 Mills/Kilowatt-hour (KWh) Assessment

PG&E and staff recommend that since QFs should not be held responsible for the cost of most transmission upgrades, 1.2 mills/kWh should be refunded from any payments received under the terms of the interim solution. In addition, the 1.7 mills/kWh charge should be reduced to .5 mill/kWh prospectively. The interim solution provided that 1.2 mills/kWh of the 1.7 mills/kWh is refundable if the Commission determines that QFs have no cost responsibility. However, PG&E believes the interim solution is unclear as to what QFs should pay after the Commission's decision is issued. PG&E and staff assert that it is equitable for QFs to continue paying .5 mill/kWh over the life of the contracts since the QFs are receiving the benefits of transmission access before the transmission upgrades and lines necessary to accommodate their deliveries are completed.

The QFs maintain that no assessment is appropriate after the Commission issues a decision finding that QFs usually will have no cost responsibility. The QFs assert that the Commission cannot in "good conscience" assess a continuing charge of .5 mill/kWh, no matter how small, after it determines that QFs are not responsible for transmission upgrades or lines.

VI
Discussion

A. QFs generally are not responsible for the cost of transmission upgrades or lines

QF deliveries are a significant part of each utility's resource plan. Accordingly, utilities must plan for and otherwise enable QF facilities to interconnect with their transmission systems in an expeditious manner. We recognize that both the diversity and the number of emerging QFs in PG&E's system have created new problems for the company's transmission planners. However, PG&E along with the other utilities must learn to facilitate the addition of QF power as it already has learned to accept power deliveries from all other resources.

The parties have agreed among themselves that QFs should not be responsible for the cost of transmission facilities which serve multiple purposes. The parties find since the ratepayers in the past have paid for these transmission facilities, the ratepayers should continue to absorb the cost as long as the transmission facility has system-wide benefits. A QF is responsible only for interconnection and other facilities that have no system-wide benefits and are solely beneficial to the QF. This approach eliminates the need for a difficult cost allocation among the various users of a transmission facility.

System-wide benefits can mean many things as shown in SDG&E's list of factors affecting its transmission planning. Thus, we believe that nearly all transmission facilities arguably may have some system-wide benefits. Bulk transmission lines by definition have system-wide benefits. And nearly all area lines probably will have some system-wide benefits. Thus, QFs will assume cost responsibility only on a rare occasion that an area line lacks any perceptible system-wide benefit.

On occasion, a transmission facility's cost may outweigh its system-wide benefits. In this event, the QF perhaps should be responsible for any excessive cost caused by the interconnection of its facility to the utility's system. A rigourous cost-benefit analysis, however, touches upon many as yet undefined criteria.

We have yet to determine a long-run avoided cost methodology for QFs. We have not yet adopted consistent energy reliability criteria for all utilities. The cost of transmission service is just one piece to the puzzle of properly valuing QF power. Thus, for the moment, we will allow utilities to follow the general principle that as long as a transmission facility has system-wide benefits, the utility's ratepayers are responsible for the prudent and reasonable cost. The QF is responsible only for interconnection cost and other special facilities which have no system-wide benefits. Refinement of this principle must await our determination in the long-run avoided cost proceedings.

B. A transmission cost cap can be a useful guideline for utilities and QFs

PG&E has asked for Commission approval of the concept of a cost cap. PG&E's witness Malinowski carefully explained that a cost cap would help PG&E in its transmission planning for QFs as a benchmark of costs that will be absorbed by ratepayers. However, Malinowski went on to say that PG&E would continue the same analysis in its transmission planning that would occur without the guideline of a cap. The concept of a cost cap is attractive but the calculation of the level of a cap involves many of the previously mentioned criteria which are not well-defined. To the extent a cost cap will be added to PG&E's existing analysis and will not become an accepted substitute for the usual study of a proposed transmission facility, it may refine and improve PG&E's current transmission planning process. Thus, we will permit PG&E to develop a cost cap and use it as a tentative guideline in its planning.

We caution PG&E that its calculation of a cap may be examined by QFs and staff. The level of a cap may vary greatly depending on the selected assumptions. The information underlying the derivation of any cap should be shared with all interested parties. A QF may, by complaint to the Commission, allege that a selected cap is unreasonable and thereby bring the reasonableness of the utility's calculation into issue.

C. A .5 mill/kWh assessment should continue until the transmission upgrades associated with the interim solution are completed

Under the terms of the interim solution, 1.2 mills/kWh of the 1.7 mills/kWh assessment is refundable if the Commission finds the QFs have no cost responsibility for transmission upgrades. Since we have determined that QFs have virtually no responsibility for transmission facilities with system-wide benefits, 1.2 mills/kWh clearly should be refunded.

Since QFs participating in the interim solution will receive access to transmission before the associated upgrades are completed, we find it is reasonable to continue a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed. The payment is a minimal offset to the potential diseconomies identified by PG&E. However, since PG&E has stated that the diseconomies will end once the upgrades are completed, there is no reason to continue the assessment beyond the completion date. Therefore, as each upgrade is completed, the QFs whose delivery was constrained by that line no longer should be liable for a .5 mill/kWh charge.

D. PG&E's Petition to Modify the Interim Solution to Exclude the Intertie should be granted

The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling, incorporate it by reference herein, and grant PG&E's Petition to Modify D.84-08-37. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution.

We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine the ability of HydroPool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that HydroPool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution, as long as its interconnection is through the Intertie. We note that we need not reach the issue of whether HydroPool's Standard

Offer 4 tenders complied with all requirements prior to our having prospectively suspended Standard Offer 4.

We stress that this decision does not determine *access* to the Intertie. No one has declared that HydroPool cannot use the Intertie to deliver power to PG&E. The dispute is one over the price which must be paid for that power. The evidence in this case supports our decision, made in response to a documented, critical but temporary situation of transmission system constraints, not to make Standard Offer 4 prices available to *any* QF interconnecting with the Intertie. The record nowhere indicates and, in fact, contradicts any notion that either the Commission, the Commission staff, the respondent utilities, or any QF ever contemplated that our Standard Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing evidence that PG&E's avoided cost in such a situation is indeed equivalent to the Standard Offer 4 price.

Finally, we do not reach the larger question of whether, and, if so, under what conditions, QFs ever should have access to the Intertie under a Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be addressed in that proceeding will include, but will not be limited to:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-state QFs would cause displacement of economy energy, especially from the Northwest;

2. the feasibility of developing pricing and curtailment options to protect ratepayers from paying uneconomic prices

to out-of-state QFs should we determine that out-of-state QFs ought to be given an opportunity to serve the California power market;

3. a comparison of California and non-California avoided costs, to provide a perspective on the relative attractiveness of California as a market for out-of-state QF power; and

4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-state QFs and the form that such offers should take.

By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on HydroPool's projects. The question of whether HydroPool should be granted access to the Intertie will appropriately become part of the more general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection.

Findings of Fact

1. PG&E expects to have significant constraints in its northern transmission system during the next ten years which may affect QF development.

2. Edison and SDG&E do not expect to have any significant transmission constraints over the next ten years.

3. The parties agree that transmission facilities which have system-wide benefits should be paid for by ratepayers.

4. The parties agree that transmission facilities which lack system-wide benefits and are beneficial only to the QF should be paid for by the QF.

5. Bulk transmission lines have system-wide benefits and should be paid for by ratepayers.

6. Nearly all area transmission lines will have system-wide benefits and should be paid for by ratepayers.

7. A rigorous cost-benefit analysis of a transmission facility is dependent on criteria yet to be defined in other Commission proceedings.

8. QFs participating in the interim solution should be refunded 1.2 mills/kWh but should continue to pay a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed.

8a. D.85-06-163 stated that resolution of PG&E's Petition to Modify the interim solution by excluding the Intertie would determine the ability of HydroPool to enter Standard Offer 4 agreements with PG&E.

9. The Intertie is different from other constrained transmission lines in PG&E's northern system since (1) QF interconnection to the Intertie may cause greater displacement of economy power than QF interconnection to other lines, (2) QF interconnection to the Intertie will affect PG&E's negotiations of power purchase deliveries over the Intertie, and (3) PG&E has never represented to QFs that interconnection to the Intertie would be acceptable without price adjustments or curtailment provisions.

10. This investigation should be closed so that the parties may devote their attention and resources to the pending OIR 2 proceedings and the determination of long-run avoided cost for QFs.

Conclusions of Law

1. Ratepayers in the past have paid for transmission facilities which serve multiple purposes. Ratepayers should continue to pay for transmission facilities which have system-wide benefits.

2. QFs participating in the interim solution should continue to pay a .5 mill/kWh assessment until the transmission upgrades which are intended to eliminate operating diseconomies are completed.

3. A rational basis exists for excluding the Intertie from the terms of the interim solution.

3a. PG&E's Petition to Modify D.84-08-037 to exclude the Intertie from the terms of the interim solution should be granted.

3b. Granting PG&E's Petition to Modify will have the effect of determining that HydroPool does not have the ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution, but will not have the effect of excluding Hydro-Pool from the Intertie under some other pricing arrangement.

4. The Commission should establish a separate proceeding to investigate the unresolved questions relating to the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place. The issue of whether HydroPool should be granted interconnection for its projects should be taken up in this new proceeding.

ORDER

IT IS ORDERED that:

1. Utilities shall require QFs to pay only for transmission facilities which lack system-wide benefits and are beneficial only to QFs.

2. QFs participating in the interim solution shall be refunded 1.2 mills/kWh and shall continue to pay .5 mill/kWh until the transmission upgrades associated with the interim solution are completed.

3. Pacific Gas and Electric Company's Petition to Modify D.84-08-037 is granted to exclude the Intertie from the terms of the interim solution.

4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place.

5. I.84-04-077 is closed.

This order becomes effective 30 days from today.

Dated *September 18, 1985*, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
FREDERICK R. DUDA
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

I will file a written dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

Appendix A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.	I.84-04-077 (Filed April 18, 1984)

Administrative Law Judge's Ruling

Introduction

On April 12, 1985, counsel for Pacific Gas and Electric Company (PG&E) moved to dismiss the proceeding insofar as it involved the right of HydroPool-Cogeneration Services, Inc. (HydroPool) to interconnect to the Pacific Northwest-Pacific Southwest 500 Kv Intertie (Intertie). San Diego Gas and Electric Company (SDG&E) and the Commission's Public Staff Division (staff) moved to strike the evidence offered by HydroPool.

The Commission in Decision (D.) 84-11-123 granted a limited rehearing on the question of Qualifying Facility (QF) interconnection to the Intertie under the terms of an interim solution for transmission constraints in PG&E's service territory. Hearings were held on December 17, 1984, March 28-29, 1985, April 9, 10, and 12, 1985. John E. Kerler, Supervising Power System Engineer, testified on behalf of PG&E. Dennis E. Peseau, Senior Vice President and Senior Economist of Zinder Companies, Inc., Robert K. Weatherwax, Jr., President of Sierra Energy and Risk Assessment, Inc., and Ivan Gold, President of Cogeneration Services, Inc. and managing partner of HydroPool, all testified on behalf of HydroPool. Further hearings were suspended until a ruling is issued on the motions.

PG&E, other utilities, and staff have argued that the intent of the signatories to the interim solution is the only relevant factor. They intended to exclude the Intertie from the interim solution.

Accordingly, they assert HydroPool or any other QF has no right to interconnect to the Intertie under the terms of the interim solution.

PG&E's witness Kerler explained why PG&E has excluded the Intertie from the interim solution. Kerler testified that at the time the interim solution was drafted, PG&E believed no firm capacity on the Intertie would be available for QFs. If QFs were allowed to interconnect to the Intertie, PG&E believed that the QFs would displace cheaper economy power from the Northwest.

PG&E asserts that the QFs which are allowed to interconnect to constrained bulk or area lines under the interim stipulation will cause only temporary operating diseconomies since transmission upgrades have been identified for those lines. Thus, PG&E agreed to allow QF interconnection to those lines because the company believes the lines' capacity can be increased and the disconomies will end.

PG&E's evaluation of the Intertie is quite different. PG&E has never believed that firm capacity on the Intertie will be available. Consequently, the company consistently has refused to give QFs any access to the Intertie.

HydroPool responded to PG&E's showing by attempting to show that access capacity will be available on the Intertie and that other QFs could cause displacement of Northwest economy power.

HydroPool's witness Peseau testified that firm surplus resources in the Northwest and very favorable water conditions have resulted in high utilization of the Intertie in the last four years. Peseau asserted that the Northwest's large surplus should diminish and average water conditions should return in the future. He concluded that the declining firm surplus with average water conditions should not fill the expanding capacity of the Intertie.

HydroPool's witness Weatherwax examined PG&E's long range plans and determined that PG&E should not use all of its Intertie capacity over the course of any year for the next 20 years. Weatherwax stated that if HydroPool is permitted to interconnect its projects to the Intertie there will not be a one-to-one displace-

ment of Northwest economy power. In addition, Weatherwax testified that other QF projects may cause displacement of Northwest economy power during minimum load conditions. Thus, Weatherwax asserts HydroPool is similar to other QF projects in its impact on the PG&E transmission system.

HydroPool's witness Gold testified that the only economic market for the HydroPool projects is in California and the Intertie is the only transmission path for these projects. Without Commission approval, Gold stated that HydroPool's projects will not be built.

PG&E Motion to Dismiss

PG&E raises several grounds for dismissing HydroPool's claim in this proceeding. PG&E argues that HydroPool is not entitled to a QF contract, that HydroPool's marketing agreements are not legal under PURPA, and that HydroPool has failed to comply with Decision (D.) 84-08-037. In addition, PG&E maintains that no unlawful discrimination has been shown by HydroPool.

PG&E asserts that since HydroPool is not the owner or operator of its cogeneration and small power production facilities, HydroPool is not a QF under PURPA. PG&E points out that HydroPool is a broker or agent for QFs as it owns only a de minimis 2.5% holding in one facility.

Furthermore, PG&E claims HydroPool even lacked authority to execute power purchase agreements on behalf of the developers. PG&E asserts that HydroPool's marketing agreements with developers provide that HydroPool is merely to deliver power purchase agreements to the developer for the developer's execution.

PG&E submits that HydroPool is a broker for power and is not a QF. Accordingly, PG&E believes HydroPool's claim should be dismissed.

PG&E next argues that HydroPool's marketing agreements provide for deliveries of utility power at QF prices. The marketing agreements contain "shaping" provisions which permit substitution of a "shaping" utility's power for the QF's generation. PG&E submits that this "shaping" substitution clearly violates PURPA.

PG&E argues that HydroPool has not complied with the interim solution as approved by the Commission in D.84-08-037. The interim solution provided that priority rights for each transmission allocation are not transferable between projects. PG&E points out that only seven of the fourteen projects mentioned by HydroPool to PG&E in August, 1984, are still being pursued. PG&E asserts HydroPool has substituted other projects for some of the original projects in violation of D.84-08-037.

Finally, PG&E submits that no discrimination has been shown by HydroPool since no QF has been allowed by PG&E to deliver over the Intertie. PG&E points out that HydroPool was offered an opportunity to deliver power on a radial line to a PG&E area transmission line. Furthermore, PG&E claims that it has denied the request of another QF to interconnect to the Intertie. Thus, PG&E concludes that HydroPool has been treated in the same manner as other QFs.

HydroPool Response

HydroPool asks the Commission to deny PG&E's motion for several reasons.

First, HydroPool asserts that PG&E failed to make its motion upon five days written notice as required by Rule 56. HydroPool claims PG&E has known of HydroPool's agency relationship with its projects as early as November, 1984. Therefore, HydroPool argues PG&E's motion is improper and should be denied.

HydroPool also asserts that it was expressly authorized to act as agent for QF project owners. HydroPool claims that the owners verbally authorized its agency authority and subsequently ratified HydroPool's actions.

HydroPool points out that it has never received a transmission allocation under the interim solution since PG&E consistently has denied all requests for interconnection to the Intertie. Therefore, HydroPool submits it has not improperly shifted an allocation between projects.

Finally, HydroPool maintains that all QFs participating in the interim solution may cause displacement of Northwest economy

power. Thus, HydroPool asserts that the seasonal displacement of Northwest economy power is not a valid basis for excluding only HydroPool's projects from the interim solution.

SDG&E and Staff Motion to Strike

SDG&E moved to exclude the testimony of HydroPool witnesses Peseau and Weatherwax. Counsel for SDG&E argues that the interim solution rationally differentiates between classes of QFs. He asserts the Intertie is significantly different from the rest of PG&E's transmission system and is properly excluded from the interim solution. To SDG&E, interconnection to the Intertie is a price issue which should be addressed in another proceeding.

Staff joined SDG&E in moving to strike the testimony of Peseau and Weatherwax. Staff believes the only relevant issue is the intent of the interim solution. Staff further argues that HydroPool's witnesses have not shown that one-to-one displacement of economy power will not occur if its projects interconnect to the Intertie.

Discussion

The purpose of the interim solution was to enable QFs in PG&E's constrained northern transmission system to proceed with their projects until these constraints are relieved by transmission upgrades and new transmission lines. The terms of the interim solution were limited to QFs located within PG&E's service territory. The Commission in D.84-08-037 removed the in-service area restriction and stated: "At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries."

PG&E immediately filed a petition for modification of D.84-08-037 asserting that it intended to exclude the Intertie from the interim solution because interconnection to the Intertie could result in one-to-one displacement of economy power. PG&E also asserted that this displacement would not be relieved by planned transmission upgrades or new transmission lines. PG&E then

asked the Commission to exclude the Intertie from the interim solution as a matter of policy.

The Commission declined to exclude the Intertie from the interim solution and instead ordered a limited rehearing on this matter. (See D.84-11-123.)

The issue addressed in the limited rehearing is whether PG&E's proposed exclusion of the Intertie from the interim solution is a reasonable distinction among its constrained transmission lines or unlawful discrimination against a class of QFs.

The California Supreme Court in *United States Steel Corp. v. Public Utilities Commission*, 29 Cal. 3d 603 (1981) set forth some guidelines for the Commission's determinations on claims of discrimination. The Court affirmed the Commission's wide discretion in prescribing economic classifications but stated that mere administrative inconvenience may not justify an imprecise classification. The Court observed that the Commission's finding of administrative "difficulty" to support a rate exemption was inadequately supported by record evidence. (29 Cal. 3d at 614.) Here it is unlikely that the mere declaration of the signatories' intent would be considered a sufficient basis for the exclusion of one transmission line and QFs in proximity to that line from the interim solution.

The record for this proceeding now contains sufficient evidence for a Commission finding. Prior to hearing, the Commission lacked any evidence apart from a PG&E petition alleging that permanent one-to-one displacement of economy power could result from QF interconnection to the Intertie. At hearing, PG&E was required to present a witness to substantiate its claim. HydroPool was permitted to cross-examine and was given an opportunity to present rebuttal witnesses. In addition, PG&E stated it wants to present additional evidence should the Commission find that its initial presentation is lacking.

The salient facts developed in the record are as follows:

In recent years, PG&E's capacity entitlement on the Intertie was fully utilized due to above average hydro conditions. Based on this recent experience, the company may predict that all of its

capacity on the Intertie could be used in the next few years. Assumption of average hydro conditions would lead to a different conclusion, i.e., capacity will be available most of the year. However, at times such as during the spring run-off months, the Intertie will be fully used even under average hydro conditions. If allowed to interconnect, HydroPool's projects will displace economy power at these times.

The QFs allowed to interconnect to other constrained transmission lines also may cause displacement of economy power on the Intertie. Under minimum load conditions, surplus area generation may be transmitted from the northern area to the Bay Area over the Intertie. To the extent QF deliveries in the northern area cause a resource-load imbalance, these QFs may displace economy power deliveries over the Intertie if other PG&E resources are not curtailed.

PG&E has claimed that the operating diseconomies expected under the interim solution are temporary. However, the transmission upgrades associated with the interim solution will not relieve a capacity constraint on the Intertie. Thus, the diseconomy of Intertie back-offs may continue after these upgrades are completed.

PG&E never has allocated firm capacity on the Intertie to a QF. PG&E instead has offered to purchase QF power delivered on the Intertie on an interruptible basis or at prices competitive with economy power.

From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. First, direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such economy power is available *and* uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie back-off caused by other QF interconnection to other lines. Second, direct interconnection will reduce PG&E's available firm capacity on the Intertie in its negotiations of long term capacity contracts in

the Northwest. Other QF interconnections to other lines will not alter PG&E's negotiating posture. Third, PG&E never has represented to QFs that it would accept firm QF deliveries on the Intertie without price concessions. On the other hand, until PG&E's discovery of unforeseen constraints in its northern transmission system, PG&E expected QF interconnection to other transmission lines to occur under the various approved standard offers in the ordinary course of business. Thus, there is a basis for distinguishing the Intertie from other constrained transmission lines.

Ruling

The objective of this proceeding and the interim solution has been to allow QF development to proceed despite the unforeseen transmission constraints in PG&E's northern transmission system. This objective has been reasonably met by the interim solution without unlawful discrimination against a class of QFs. No further hearings are required on the issue of QF interconnection to the Intertie under the terms of the interim solution. The Commission may modify D.84-08-037 to exclude the Intertie from the interim solution as requested in PG&E's petition for modification. Alternatively, the Commission may deny PG&E's petition and allow HydroPool to participate in the interim solution as a matter of policy.

The various motions to strike or exclude HydroPool's evidence are denied as the Commission should issue a decision based on findings drawn from this evidentiary record. PG&E's objections to HydroPool's standing as a QF will be addressed if the Commission should find that QFs should be allowed to interconnect to the Intertie under the terms of the interim solution.

Dated July 30, 1985, at San Francisco, California.

/s/ RANDOLPH L. WU
Randolph L. Wu
Administrative Law Judge

Appendix B

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the desirability of power purchases from cogenerators and small power producers located outside of the purchaser's service area or outside of California and the terms and conditions which should be applied to such purchases.	No. I. 85 11 008

ORDER INSTITUTING INVESTIGATION

[Filed Nov. 6, 1985]

By this order, the Commission begins an investigation of electric capacity and energy purchases by Pacific Gas and Electric (PG&E), Southern California Edison (SCE), and San Diego Gas and Electric (SDG&E), from cogenerators and small power producers, otherwise known as qualifying facilities (QFs), located either outside the utilities' service areas or outside of California.

QFs located in the Pacific Northwest, the Southwest, and California's Imperial Valley want to wheel power to California utilities and take advantage of higher avoided cost rates than are offered by utilities in their regions. However, the actual avoided costs paid to out-of-service area and out-of-state QFs may differ from the avoided costs paid to other California QFs. If QFs wheel power over interties, their power might displace economy energy purchases which would cause economic harm for California's ratepayers. Maintaining ratepayer indifferences, as a result of accurate avoided cost, may require additional curtailment provisions or a different pricing structure than is available to in-service area QFs.

As part of I.84-04-077, the Commission adopted D.84-08-037 which authorized an interim solution to allow QFs to continue development in the northern part of PG&E's service area during

completion of transmission capacity upgrades and additional new lines.

Cogeneration Services, Inc. (Hydro Pool) sought to wheel power from projects in the Pacific Northwest to PG&E over the Pacific Intertie under the terms of the interim solution. In D.85-09-058, the Commission decided that the Pacific Intertie should be excluded from the interim solution but that the issue of purchases from out-of-state QFs deserved further study. Ordering paragraph No. 4 states:

> "4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place."

Since many of the issues that apply to out-of-state QFs, such as the use of interties, also apply to QFs in the Imperial Valley and other remote areas of California, the scope of this investigation is expanded to include QFs located in the state but outside the purchasing utilities' service area. For these reasons, we are making the major electric corporations respondents to this general investigation.

Therefore, good cause appearing,

IT IS ORDERED that an investigation on the Commission's own motion is hereby instituted into the desirability of purchasing power from QFs located outside the service area of the purchasing utility or outside the state for the purpose of determining:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-service area QFs would cause displacement of economy energy from the Northwest and Southwest;

2. the feasibility of developing pricing and curtailment options to assure that the true costs avoided by QFs are measured, including the foregone opportunity of the use of transmission lines for other sources;

3. additional contract terms needed to allow purchasing utilities to track the progress of out-of-service area QFs for resource planning purposes;

4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-service area QFs and the form of such offers; and

5. the potential discriminatory and anti-competitive effects of accepting or not accepting out-of-state QFs with the possibility for economic harm or no economic harm to the California ratepayers; and

6. additional contract terms and conditions and other factors which would negate or ameliorate against any potential economic harm to the California ratepayer.

IT IS FURTHER ORDERED that each electrical corporation named and interested parties shall file with the Commission's Docket Office by November 25, 1985 an original and 12 copies of a statement addressing each of the above issues and listing additional issues that should be included in the investigation. A prehearing conference will be scheduled to set forth the issues and schedule for this proceeding.

The Executive Director is directed to mail a certified copy of this order to the respondents and to cause a copy of this order to be mailed to all appearances in A.82-04-044 *et seq.* and I.84-04-077.

Dated November 6, 1985, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
PRISCILLA C. GREW
WILLIAM T. BAGLEY
FREDERICK R. DUDA
Commissioners

Appendix C

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2	Application No. 82-04-44
	Application No. 82-04-46
And Related Applications	Application No. 82-04-47

[Filed May 22, 1985]

PETITION FOR MODIFICATION
BY COGENERATION SERVICES, INC.
OF DECISION 85-04-075

I

INTRODUCTION

COGENERATION SERVICES, INC., ("COGEN") is a developer of alternative energy sources. It develops and markets small hydropower and cogeneration projects in California, and other states. COGEN is also a general partner of Hydropool, a partnership which develops similar projects, both in the Northwest and in California. (Both parties hereafter "COGEN"). COGEN appeared as Interested Parties in this case at the November 5 *en banc* hearing and argued against the Staff motion for various modifications to Interim Standard Offer 4. RT.1428:7-8. COGEN subsequently filed an opposition memorandum both to the Staff motion and a related motion made orally by PG&E at the *en banc* hearing; and concurrently requested a continuance of the hearings on those motions. COGEN has also participated in workshops held by the Public Staff to discuss the issues in this case.

In addition COGEN has participated as an Interested Party in the "transmission constraints" case, OII 84-04-77. A major issue

in that case has been the applicability of the Commission's "Interim Solution Order" to QFs located outside PG&E's service area. See D.84-08-037. Shortly after its issuance, PG&E petitioned to modify the "Interim Solution" so as to exclude fourteen of COGEN's Northwest QF projects which planned to interconnect on the Pacific Northwest Intertie. In response to that Petition, the Commission first ordered limited rehearings in D.84-11-123; and later ordered consolidation of the Intertie issue with the bulk transmission hearings. See D.85-01-039. Since then, the parties have presented several witnesses and documentary evidence in the course of several hearings. A motion to dismiss is now pending before the Commission.

After the Interim Solution was adopted, COGEN requested interconnection with PG&E and the preparation of standard contracts for the fourteen projects. See Exhibits 1 and 2 attached. Because of the pending Petition for Modification, PG&E refused to process the contracts in the ordinary course. See Exhibit 3 attached. Rather, hearings were set on the Petition. During this time COGEN tendered contracts for each project and proposed execution conditioned upon the outcome of the hearings. See Exhibit 4 attached. PG&E, however, would not accept this proposal.

The Commission's suspension order, D.85-04-075, on its face, would preclude execution of contracts with the fourteen Northwest QFs, even if the Petition for Modification in the constraints case is denied. However, COGEN believes that the fourteen Northwest contracts were not intended to be affected by the Commission's suspension order herein. Rather, because of the unique circumstances, the Northwest QF projects have been suspended pending the outcome of hearings on the Intertie issue and PG&E's Petition for Modification. This "limbo" status existed for eight months prior to the April 17 suspension order. Therefore, the availability of Interim Standard Offer 4 for these projects should rest upon a decision in the Constraints case.

At the Workshop of May 3, 1985 Commission Staff indicated that QFs who were affected by the suspension order should request relief by means of a Petition for Modification. Therefore, the purpose of this Petition is to seek clarification from the

Commission that the Decision 85-04-075 would not apply to the fourteen QFs; and that interim Standard Offer 4 may be available to them upon a decision in the Case No. I-84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

II

FACTUAL BACKGROUND

In August, 1984, the Commission issued Decision No. 84-08-037 which approved the Interim Solution for QFs in PG&E's northern area. In that order, the Commission modified a prior stipulation by certain parties to provide that the benefits of the order would extend to all QFs affected by transmission constraints, whether within or without PG&E's Northern service area. *Id.* at page 10, OP No. 1a; FF No.'s 7 and 8. This modification was made upon the motion of several QFs at a prior prehearing conference, including COGEN. *Id.* at page 5. PG&E subsequently petitioned to modify the order so as to exclude QFs interconnecting to the Intertie north of Round Mountain Substation. The only QFs affected by such petition are the fourteen Northwest projects proposed by HydroPool.

Before decision on this Petition, HydroPool requested interconnection and the preparation of contracts for its fourteen Northwest projects. See Exhibits 1 and 2 attached. PG&E refused to process this request, contending that it did not believe the Interim Solution applied to QFs on the Intertie. See Exhibit 3 attached. Thereafter, out of concern with the regulatory lag, HydroPool tendered seven contracts in PG&E's Standard Offer 4 form conditioned upon the outcome of the Petition for Modification. See Exhibit 4, para. 4. PG&E refused to sign any contracts for similar reasons. As described above, the Commission subsequently ordered limited rehearings on the Intertie issue; and later consolidated them with the first phase hearings on bulk constraints. See D.84-11-123 and D.85-01-039. The remaining seven contracts were subsequently submitted and refused.

III

GROUNDS FOR RELIEF

As stated in PG&E's Petition for Modification of D.85-04-075, most of the "orphan contracts" remained unsigned on April 17 because of the "gold rush" of contracts submitted in the last few weeks prior thereto. See PG&E's Petition for Modification 2:14-23 (5/15/85). In effect, PG&E contends that it could not execute all these contracts in due course because of the heavy volume of contracts tendered. *Id.*

Unlike these QFs, PG&E never *began* to process the contracts tendered by HydroPool. In fact, it was necessary for HydroPool to fill out a contract form and tender it to PG&E because of the Utility's unwillingness to prepare formal contract documents, as is customary. Its express reason for doing so was the pendency of rehearings on the Petition for Modification; and its belief that it was not obligated to purchase from QFs delivering on the Intertie. See Exhibit 3. PG&E recognized the unique circumstances: "Because PG&E views HydroPool's position, vis-a-vis the interim solution, as unique this reservation of participation is not contingent upon any further action by HydroPool at this time." Exhibit 3, para. 2.

Thus, the reasons for non-execution of these fourteen contracts are very different from those other QFs which could not obtain mutually signed contracts because of the "gold rush." For this reason, and because the lack of execution is due to hearings pending before the Commission, HydroPool does not believe that the Commission intended to include the Northwest projects in its order suspending Standard Offer 4.

Furthermore, to so hold would be grossly inequitable under these circumstances. HydroPool first requested interconnection and Standard Offer 4 contracts on August 7, 1984. The Commission did not suspend Standard Offer 4 until April 17, some eight months later. The sole reason for PG&E's failure to execute these contracts was its pending Petition for Modification, and the ensuing hearings on the Intertie issue. But for the pendency of these hearings it is clear that the Northwest projects would have moved forward and contracts been signed in due course. Utilities

have a mandatory duty to sign Standard Offers in Commission-approved form, unless the QF requests negotiated terms. D.84-08-031, p.61, OP#3. Thus, it is only the regulatory lag time which has placed these fourteen QFs under the suspension order.

If the Commission denies the Petition for Modification (as it should) and allows the Northwest projects to proceed under the Interim Solution it would be grossly inequitable to deny to them the form of contract which was available and would have been executed but for the Petition for Modification. Otherwise, such a result would penalize a QF after it had relied on a Commission order and because a utility chose to fight the issue.

IV

CONCLUSION

For the reasons stated herein, COGEN respectfully requests that the Commission modify D.85-04-075 to provide that the suspension of Standard Offer 4 does not apply to the fouteen HydroPool projects totaling 66.2 megawatts; and that interim Standard Offer 4 may be available to them upon a decision in Case No. I.84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

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Respectfully submitted,

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Appendix D

Cal. Pub. Util. Code § 1709 provides:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Cal Pub. Util. Code § 1733(b) provides:

> "Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 60 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application."

Rule 63 of the Commission's Rules of Practice and Procedure, found at 20 Cal. Admin. Code § 63, provides:

> "Authority. The presiding officer [Administrative Law Judge] may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission."